ORIGINAL

No. 96-5369

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DANIEL GREENE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Should this Court grant certiorari to clarify Wainwright v. Witt, 469 U.S. 412 (1985), based upon an alleged conflict in its application by the states and federal habeas corpus courts, when this question was not properly presented to nor decided by the state appellate court?

II.

Should this Court grant certiorari to review Petitioner's challenges to the trial court's evidentiary rulings at the sentencing phase when his federal question was not raised before nor decided by the state appellate court?

III.

Should this Court grant certiorari to consider Petitioner's Eighth Amendment question arising from the prosecutor's cross-examination of Petitioner which is raised for the first time in the instant petition?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Daniel Greene, was indicted by the Taylor County, Georgia, grand jury on October 14, 1991, for the September 21, 1991, malice murder of Bernard Walker, the September 27, 1991, armed robbery of Virginia Wise, and aggravated assault upon Ms. Wise. (R. 13-15). The state gave notice of its intent to seek the death penalty at the Unified Appeal arraignment hearing on October 28, 1991. Id. at 34-37. The state gave written notice of its intent to seek the death penalty on June 15, 1992. Id. at 305.

On October 26, 1992, the trial court granted Petitioner's motion for change of venue and directed that the case be transferred to the Superior Court of Clayton County, Georgia. (R. 91; 379-80). At a jury trial on November 30 - December 9, 1992, the jury found Petitioner guilty of murder, armed robbery and aggravated assault on December 7, 1992. (R. 733). The jury found the existence of the O.C.G.A. § 17-10-30(b)(2) statutory aggravating circumstance, that the murder was committed during the course of an armed robbery, and fixed the sentence for murder as death. (R. 733; T. 982-84). In accordance with the jury's binding recommendation, the trial court sentenced Petitioner to death, and the trial court imposed a consecutive life sentence for armed robbery and a consecutive 20-year sentence for aggravated assault. (T. 994-95).

After trial the case was transferred to Taylor County, Georgia, and new counsel appointed to represent Petitioner for appeal. (R. 739; 740). Petitioner filed a motion for new trial on or about March 22, 1993. (R. 741). An amended motion for new trial was filed on May 9, 1994. (R. 744). Following a hearing on the motion for new trial on January 27, 1995, the trial court denied the motion for new trial as amended on March 29, 1995. (R. 808; 820). Petitioner filed a timely notice of

appeal on April 26, 1995. (R. 1-2).

On March 15, 1996, the Georgia Supreme Court affirmed Petitioner's convictions and sentences. Greene v. State, 266 Ga. 439, 469 S.E.2d 129 (1996). Petitioner's motion for reconsideration was denied on March 28, 1996. Id.

Petitioner has now filed the instant petition, seeking review of the state appellate court's decision in his direct appeal. This response in opposition to the petition for a writ of certiorari follows.

Due to the nature of the issues raised, Respondent will not set forth a detailed statement of facts underlying the crimes at this time. Respondent adopts and incorporates by reference herein the facts found by the Georgia Supreme Court, which are as follows:

> On the evening of September 27, 1991, Greene made a series of trips to the Suwanee Swifty, a convenience store and gasoline station in Reynolds, Taylor County, Georgia. During his final visit, Greene grabbed the store clerk, Virginia Wise, held a knife to her throat, and told her to give him the money from the cash register. After obtaining the money, $142.55, Greene continued to hold the knife to Wise's throat. He pulled her to the back room, then cut her across three fingers and stabbed her through the lung and liver. Upon hearing the automatic doorbell ring as Bernard Walker entered the store, Greene placed Wise against the bathroom wall, telling her that if she left the room he would have to kill her. Greene reentered the public area of the store and encountered Walker waiting at the counter to make a purchase. He stabbed Walker in the heart, threw down the knife, left the store and

> drove away. After attempting to get help, Walker fell dead in the parking lot.
>
> Later that evening, Greene went to the home of Willie and Donice Montgomery, an elderly couple in rural Macon County for whom Greene had worked as a farm laborer for about two months. Greene burst through the Montgomerys' kitchen door wielding a knife and asked for their car keys. Mr. Montgomery gave Greene the keys, and Greene proceeded to stab each victim multiple times in the head.
>
> After leaving the Montgomerys' home, Greene drove their car to a convenience store in Warner Robins, Houston County, Georgia. Once there, he held a butcher knife to the cashier, Bonnie Roberts, and forced her to give him the money from the cash register. He then walked toward her and attempted to stab her in the chest. She bent down, and Greene then drove the knife into the back of her shoulder. Greene then drove the Montgomerys' car to the home of an acquaintance in Warner Robins, where he was apprehended.
>
> Greene was tried separately and convicted of the Macon and Houston County crimes. The trial from which this appeal is taken concerned only Greene's indictment for the crimes committed in Taylor County.
>
> Before trial, Greene confessed to the crimes, explaining in a videotaped interview that he had committed them to obtain money for crack cocaine. At trial, Greene testified that he could not remember committing the crimes or confessing, and that he could only recall experiencing a severe headache inside the Suwanee Swifty after having smoked a cigarette given to him earlier by an acquaintance. He theorized that his criminal behavior might have been induced by the cigarette, which must have been laced with a powerful, mind-altering drug.

Greene, 266 Ga. at 444-45.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO CLARIFY WHAT SHOULD BE THE STANDARD TO BE APPLIED BY STATE COURTS TO REVIEW THE EXCUSAL OF PROSPECTIVE JURORS DUE TO THEIR VIEWS ON CAPITAL PUNISHMENT, WHEN THIS QUESTION WAS NOT PROPERLY RAISED BEFORE THE STATE APPELLATE COURT.

Petitioner has asked this Court to grant certiorari to clarify Wainwright v. Witt, 469 U.S. 412 (1985), as Petitioner contends the standard is allegedly not being applied in the same manner by the state courts, with some state courts allegedly giving complete discretion to the trial judges to allow removal of prospective jurors and state appellate courts are allegedly turning a "blind eye" to those findings. Petitioner also contends that Wainwright v. Witt is a standard to be applied by federal habeas corpus courts and that a new standard should be promulgated for state courts on direct review. Respondent urges this Court to decline to grant certiorari to consider these questions which are raised for the first time in the instant petition.

As his first enumeration of error on direct appeal, Petitioner contended, "The trial court erred in its rulings on motions to challenge jurors for cause based on their attitudes

about the death penalty." (Petitioner's Brief on Appeal, p. 9). Petitioner asserted that Wainwright v. Witt was the governing standard. Id. Petitioner simply challenged the individual excusals of several prospective jurors as error under Witt and did not assert that a new standard should be fashioned by state courts, as opposed to federal habeas corpus courts. Id.

The Georgia Supreme Court quoted Witt at length and found that the voir dire transcript as a whole rebutted Petitioner's claims that jurors who had allegedly expressed only qualms about capital punishment had been excused. Greene, 266 Ga. at 440-41. The Court found that the trial court had undertaken an exhaustive and conscientious effort to ascertain whether the individual jurors' views "would prevent or substantially impair the performance of their duties in accordance with their instructions and oaths." Id. The Court gave great deference to the trial court's assessment of the demeanor and credibility of prospective jurors as the trial court was in the best position to make that assessment. Id. The Court concluded that no Witt error had been shown and that Petitioner's argument that the trial court had erred was based "upon a fundamental misconstruction of Witherspoon v. Illinois, [391 U.S. 510 (1968)]," as Witherspoon had not created a new ground for challenging prospective jurors but recognized a ground of disqualification for bias in the context of a capital

case. Id. Thus, the court had not been presented with the arguments now advanced by Petitioner, that is, that Witt may not be the proper standard for state courts to apply.

In his motion for reconsideration, Petitioner first claimed that the Court should not overrule Jarrell v. State, 261 Ga. 880, 413 S.E.2d 710 (1992). (Motion for Reconsideration, p. 2). Petitioner then seized upon a gratuitous observation which had been made by one of the dissenters to assert that "the majority appears to apply a standard of deference that is appropriate for a reviewing court on federal habeas corpus, but not by a state supreme court on direct appeal." Id. at 2-3. The Court did not issue a new opinion when denying Petitioner's motion for reconsideration. (Petitioner's Appendix B).

This Court has previously declined to consider federal questions raised for the first time in a petition for rehearing unless the highest state court had actually decided the question. Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945). Thus, Respondent submits that this Court should decline to grant certiorari to consider an issue which was not properly raised until the motion for reconsideration and which had not previously been presented to the state appellate court.

II. AS PETITIONER DID NOT CLEARLY RAISE, NOR DID THE STATE APPELLATE COURT DECIDE, QUESTIONS OF WHETHER THE USE OF A "HEARSAY" STATEMENT OF A PRISONER AND THE "USE OF UNPRECEDENTED, EXTRAORDINARY SECURITY DEVICE TO CONTROL THE DEFENDANT" VIOLATED PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, THIS COURT SHOULD DECLINE TO GRANT CERTIORARI ON THIS BASIS.

Petitioner next urges this Court to grant certiorari to consider whether the prosecutor's use of a "hearsay" statement made by Petitioner to a third party and the use of "unprecedented, extraordinary security device" about which the jury was informed violated his Eighth and Fourteenth Amendment rights. Petitioner analogizes the situation to the use of excessive security measures and contends that this evidence allegedly rendered his sentencing trial fundamentally unfair. Petitioner also asks this Court to formulate a rule that a prosecutor may not comment on such evidence in closing argument. The state appellate court was not presented with these arguments and constitutional questions so that this Court should decline to grant certiorari to consider issues raised for the first time in the instant petition.

As his twelfth enumeration of error, Petitioner claimed the trial court "erred when it permitted the state to elicit hearsay testimony from two witnesses." (Petitioner's Brief on Appeal, pp. 117-21). Petitioner challenged the trial court's

ruling permitting Sheriff Giles to testify regarding a statement Petitioner made to a jail inmate. Id. Petitioner relied solely upon state law in asserting error. Id.

The Georgia Supreme Court found:

> Greene contends that an out-of-court statement attributed to him was inadmissible hearsay and that the Sheriff of Taylor County was erroneously allowed to testify as to that statement. However, an out-of-court statement is considered hearsay only if it is offered to prove the truth of what is contained therein. Bundrage v. State, 265 Ga. 813, 814 (2) (462 SE2d 719) (1995). Here, the out-of-court statement was offered to explain the pre-sentencing conduct of Greene and the Sheriff and, if their pre-sentencing conduct was a relevant inquiry, the statement would be admissible as original evidence and not as an exception to the hearsay rule. Bundrage v. State, supra at 814(2); Teague v. State, 252 Ga. 534(1) (314 SE2d 910) (1984).
>
> Greene called the Sheriff as his own witness during the sentencing phase, and on direct examination, Greene undertook to show that he had been a model prisoner who was amenable to incarceration. This direct examination rendered the conduct of Greene and the Sheriff a relevant topic of inquiry by the State on cross-examination. If it could, the State should be allowed to show that Greene's previously "model prisoner" conduct was merely a ploy to evade the death penalty and to show that the Sheriff's pre-sentencing conduct toward Greene, showing that the conduct of neither was consistent with the "model prisoner" status which Greene's direct examination of the Sheriff had intimated. Since it was Greene himself who rendered the inquiry into the pre-sentencing conduct of himself and the Sheriff a relevant topic, he cannot object that the State thereafter sought to explain that conduct with admissible original evidence. Under OCGA § 24-9-64, the State,

> as the opposite party, had the right to a thorough and sifting cross-examination of the witnesses whom Greene had called in an effort to avoid the death penalty.
>
> At some point after Greene's out-of-court statement had been introduced over Greene's hearsay objection, the prosecutor questioned the Sheriff with general regard to the security measures that had been taken in the courtroom. Greene did not object to the question that the prosecutor posed to the Sheriff or to the Sheriff's answer thereto. The only objection that was ever raised by Greene was a hearsay objection to the Sheriff's testimony regarding the out-of-court statement attributed to Greene. That hearsay objection would not be broad enough to extend to a question and answer which were related, not to any out-of-court statement, but to the Sheriff's in-court actions. In any event, the mere passing reference to extraordinary-but-unspecified security measures was not inadmissible. Since the topic of Greene's status as "model prisoner" had been introduced by Greene himself, he cannot object that the State made a general showing that security measures utilized during his trial were not those which would be employed during the trial of a "model prisoner."

Greene, 266 Ga. at 448-49.

Thus, not only has Petitioner raised issues for the first time in the instant petition, but he seeks to have this Court review issues which were not raised in the state courts as federal questions and some of which were not preserved for review by contemporaneous objection. This Court should decline to grant certiorari on this basis. Cardinale v. Louisiana, 394 U.S. 437 (1969).

III. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO CONSIDER AN EIGHTH AMENDMENT QUESTION ABOUT THE PROSECUTOR'S CROSS-EXAMINATION OF PETITIONER RAISED FOR THE FIRST TIME IN THE INSTANT PETITION.

In his final question, Petitioner urges the Court to grant certiorari to consider whether the prosecutor's cross-examination of Petitioner violated the Eighth Amendment. Respondent urges this Court to decline to consider this issue as no Eighth Amendment question was presented nor decided by the state appellate court and where that court resolved the issue solely on state law grounds.

As his fifth enumeration of error, Petitioner claimed that the prosecutor engaged in misconduct in several instances, asserting in pertinent part that the prosecutor's cross-examination of Petitioner was improper. (Petitioner's Brief on Appeal, pp. 70-74). Petitioner claimed that the prosecutor, who had opposed the request for funds by the defense, "unscrupulously" and prejudicially questioned Petitioner about whether he was retarded, whether he had been to a psychiatrist or psychologist in the past, and whether he was trying to get off on claiming that he was crazy. Id. Petitioner argued the issue largely as a violation of state law, although he did at one point analogize the prosecutor's subsequent argument to Napue v. Illinois, 360 U.S. 264 (1959), by arguing that the defense request for funds had been a sham.

Id. at 74.

The Georgia Supreme Court found:

> There was no issue as to Greene's mental illness or retardation and, when Greene testified in his own behalf, he conceded his sanity and lack of retardation. Accordingly, it was not error for the prosecutor to pursue the topic and to argue to the jury that mental illness or retardation was not an impediment to imposition of the death penalty.

Greene, 266 Ga. at 447(20).

As it is clear that no Eighth Amendment question was raised before or decided by the Georgia Supreme Court, this Court should decline to grant certiorari to consider this issue. Cardinale v. Louisiana.

CONCLUSION

Wherefore, for all of the above and foregoing reasons, Respondent prays that this Court decline to grant certiorari to review the decision of the state appellate court as it is clear that the questions presented were either improperly raised or not raised at all before that court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Paula K. Smith, Attorney of Record for Respondent and a member of the Bar of the Supreme Court of the United States, do hereby certify that I have this day served within the time for filing the within and foregoing pleading, prior to filing the same, placed it in the United States Mail, properly addressed upon:

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This 18th day of September, 1996.

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